

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

ERICSSON, INC., ET AL)
-vs-) DOCKET NO. 6:10cv473
Tyler, Texas
9:00 a.m.
D-LINK CORPORATION, ET AL) July 16, 2013

10 A P P E A R A N C E S

13 PRESENTERS

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 All right. Ms. Ferguson, if you will
4 call the case, please.

5 THE CLERK: Court calls Case No.
6 6:10cv473, Ericsson, Inc. v. D-Link Corporation, et
7 al.

8 THE COURT: All right. Announcements.

9 MR. STEVENSON: Good morning, Your Honor.
10 Ted Stevenson for Ericsson. Also presenting with me
11 today will be John Campbell. We are ready to proceed.

12 THE COURT: Okay. Thank you.

13 MR. VAN NEST: Good morning, Your Honor,
14 Bob Van Nest, Kekker & Van Nest for Ericsson -- excuse
15 me -- for Acer, D-Link, and NETGEAR. I'm here with
16 Matan Shacham, Trey Yarbrough; and Jonah Mitchell of the
17 Reed Smith Firm.

18 THE COURT: Okay. Thank you.

19 MR. JONES: Your Honor, Mike Jones for
20 Intel. I am here with Mr. Greg Arovas, Luke Dauchot,
21 Adam Alper, and Mike DeVries. --

22 THE COURT: Mr. Arovas and Mr. Jones, I'm
23 really getting tired of seeing y'all. This is getting
24 to be a habit.

25 [Laughter.]

1 MR. JONES: I apologize, Your Honor.

2 THE COURT: All right. Very well. We
3 have a lot of matters to cover this morning in a limited
4 amount of time. So let's begin with Ericsson's motion
5 for compulsory future royalty and pre-judgment and
6 post-judgment interest, Docket No. 527.

7 All right. You may proceed.

8 MR. CAMPBELL: Good morning, Your Honor.

9 I don't think there is too much to say on
10 this motion. Defendants' response -- and I will let
11 them go and respond if there is anything more -- but
12 basically said look at our motions for judgment as a
13 matter of law and, therefore, there shouldn't be a
14 compulsory royalty.

15 So I think if the Court denies the
16 motions for judgment as a matter of law, I'm not sure
17 that the parties are in disagreement that there should
18 be a compulsory royalty. In fact, defendants have
19 argued in various briefing that because of the RAND
20 obligations, no injunction should be entered.

21 If no injunction should be entered, then
22 the appropriate remedy is a compulsory royalty. So I'm
23 not sure, assuming how the JMOLs come out, that there is
24 a whole a lot of dispute.

25 THE COURT: All right. Response.

1 MR. DeVRIES: That's exactly right, Your
2 Honor. The parties are in substantial agreement. The
3 defendants have filed several post-trial motions that
4 are challenging the jury verdict. And to the extent,
5 however, that those motions are overruled, we have no
6 additional objection to entry of the ongoing royalty in
7 the amount of the jury verdict, subject, of course, to
8 the arguments we raised in those other motions.

9 The parties are also in agreement that
10 the amount of the jury verdict should not be increased
11 on a going-forward basis beyond what the jury found, and
12 that is 15 cents a unit. The reason for that is the
13 RAND obligation. But I think it is an easy one.

14 THE COURT: All right. So to be sure I'm
15 clear, if the Court were to overrule the JMOLs, then
16 both sides agree that an ongoing royalty of 15 cents
17 would be appropriate, and there is no need for a period
18 of time to negotiate and then another hearing and all of
19 that stuff?

20 MR. DeVRIES: That's correct, Your Honor,
21 subject to and without waiver of positions in those
22 other motions --

23 THE COURT: Understood.

24 MR. DeVRIES: -- that's correct.

25 MR. CAMPBELL: Yes, Your Honor.

1 THE COURT: All right. Very well. We
2 will move on then.

3 All right. Next one will be defendants'
4 Rule 50(b) renewed motion for judgment as a matter of
5 law in favor of defendants and motion for new trial. It
6 will be Docket No. 528.

7 MR. VAN NEST: Good morning, Your
8 Honor.

9 THE COURT: Good morning, Mr. Van Nest.

10 MR. VAN NEST: I'm going to be speaking
11 for all of the defendants. I am going to take on the
12 renewed motion for JMOL on liability and
13 non-infringement and invalidity. And Mr. Dauchot and
14 Mr. Alper are going to handle the damages motions --

15 THE COURT: Okay.

16 MR. VAN NEST: -- which will follow, if
17 that is okay with the Court. Again, we appreciate the
18 opportunity to present oral argument on these motions,
19 as they are very significant.

20 I know Your Honor is familiar with the
21 standard for judgment as a matter of law, so if the
22 Court will indulge me, I will get right into the merits
23 on the '215 patent, which the parties referred to during
24 the trial as the multiple feedback type patent. This is
25 the '215 that involves a type identifier field in

1 generating a multiple types -- generating a field for
2 multiple types of feedback.

3 So the evidence here doesn't support the
4 verdict, Your Honor, because the undisputed operation of
5 the devices simply fails to satisfy the requirements of
6 the claim.

7 There is no dispute now that trial is
8 done as to how the devices in the 802.11n operated.
9 There is no dispute they are only capable of generating
10 a single type of feedback. And under Your Honor's claim
11 construction that simply doesn't pass muster.

12 Here is the relevant portion from the
13 claim construction: Responsive to a receiving step
14 generating a message field including a field that
15 identifies the message type of a feedback response
16 message from a number of different message types.

17 That language was proposed by both
18 parties in connection with the Markman and adopted by
19 the Magistrate and approved by Your Honor.

20 Generating a feedback response from a
21 number of different message types.

22 THE COURT: What is your response to
23 their argument that, you know, even though you have one
24 message type, that is, in essence, a decision that's
25 been made and, therefore, you still infringe?

1 MR. VAN NEST: The answer to that, Your
2 Honor, is that Ericsson before and during the trial
3 repeatedly represented that this patent and this
4 language requires that the receiver itself have a choice
5 in the feedback message.

6 If you will look at this next slide this
7 is from the claim construction order. They got the
8 claim construction they got by indicating that the
9 invention was about creating the choice in the receiver
10 of multiple different formats of messages to use and
11 then also creating a type identifier field. That was
12 the basis upon which the claim construction which has
13 this language, from a number of different message types,
14 was created.

15 Here is another example of what they told
16 Judge Gilstrap (sic) during the argument. They said
17 this repeatedly: The invention is, as expressed in the
18 claims, giving the receiver a choice and constructing a
19 message field so it can express what it has chosen.

20 Now, we came in and sought to clarify
21 this prior to trial, and they stipulated that the patent
22 enables devices to choose between different feedback
23 responses by using a type identifier field; not a
24 designer, not a body of standards folks --

25 THE COURT: Let me hear plaintiff's

1 response.

2 MR. STEVENSON: Throughout this case,
3 from Markman all the way through trial, we have
4 consistently taken the position that the standard
5 contains a number of choices; and if a receiver chooses
6 essentially what is in the standard --

7 (Microphone turned on.)

8 MR. STEVENSON: Thank you.

9 If a receiver chooses a choice in the
10 standard and indicates it in the type identifier field
11 because the claim requires a type identifier field, then
12 there is infringement.

13 The claim -- which is up now -- basically
14 is a very short claim, and it has very few elements.

15 Sending a plurality of first data units
16 receiving that plurality. Those are easy limitations.

17 And then: Responsive to the receiving
18 step constructing a message field for a second data
19 unit, that field including a type identifier field and
20 at least one of a sequence number.

21 So the type identifier field, when that
22 is put in, is what causes infringement.

23 When we had our claim construction before
24 Magistrate Judge Giblin, this issue came up; and it was
25 met square on.

1 And the claim construction was:

2 Responsive to the receiving step generating a message
3 field, including a field that identifies the message
4 type from a number of different message types.

5 What that doesn't say is that all of the
6 particular message types need to be encoded on the chip,
7 as opposed to available within the protocol.

8 We showed to the jury, of course, and
9 Your Honor remembers seeing this, the different choices
10 that are available in the standard. And it was clear
11 from the testimony of Dr. Gibson, as well as Dr.
12 Nettles, that each device has to put this type
13 identifier field in it so the device when it transmits a
14 block acknowledgement can inform the receiver of what
15 choice it has made.

16 Now, although the defendants contend --
17 and we don't disagree they have always chosen to use a
18 compressed block acknowledgement, they still have to
19 fill out that type identifier field. It is required by
20 the standard.

21 And more importantly if they are sending
22 to a device that doesn't know what to expect, they have
23 to tell that device here comes a compressed block
24 acknowledgement instead of, for instance, a multi-TID or
25 a regular block acknowledgement.

1 THE COURT: Okay. Response?

2 MR. VAN NEST: Your Honor, that doesn't
3 answer the question. The question that flows from the
4 claim construction is: Does the device give the
5 receiver a choice? Is it capable of generating more
6 than one feedback type? This is their testimony from
7 trial, Your Honor, from Dr. Nettles.

8 I asked him point-blank: So this patent
9 requires that you have the capability to generate -- I
10 will quote it again -- multiple types of acknowledgement
11 messages, right?

12 Yes, sir, that's my understanding.

13 In other words, the device itself has to
14 have the capacity and the capability to generate
15 multiple feedback types.

16 And as Mr. Stevenson just conceded and
17 here is the quote from Dr. Nettles: The devices don't
18 have that capability. The receiver in the product that
19 you are accusing doesn't have a choice from among a
20 number of different message types. It must send the one
21 that it has, right?

22 ANSWER: It will always send a compressed
23 BlockAck.

24 Now, let me go back a slide.

25 Their expert fully understood Your

1 Honor's claim construction, and the parties understood
2 it. The parties stipulated that it requires a choice in
3 the receiver of multiple different message types. There
4 has to be the capability to do that.

5 Now, when they got to closing argument,
6 they completely contradicted Your Honor's claim
7 construction. They completely contradicted the claim
8 construction. They told the jury that the defendants'
9 argument was wrong because it misinterpreted and
10 misunderstood the claim construction, and they said that
11 you don't have to have multiple types of feedback
12 messages in the device, in the product. They said it is
13 enough if it is in the standard.

14 How does that square with this testimony?
15 Their own expert said that as he understood the claim
16 and as he understood the patent, you have to have the
17 capability to generate multiple types of feedback. And
18 they don't.

19 So for that reason, Your Honor, this is
20 no longer a question of fact. We established in the
21 trial that the devices don't have the capability, and we
22 established in the trial that the capability is
23 required; and they established in the Markman by their
24 repeated representations and the stipulation they
25 entered, that having choices in the standard itself is

1 not enough, you have to have choices in the receiver.

2 Why? It is a method claim. The method
3 claim requires that you generate a feedback response in
4 response to receiving data.

5 So this is not something that a designer
6 can do years before. It has got to be something that
7 the device itself does. And we all understood that. We
8 all acknowledged that. They stipulated to that. And
9 when we got to closing argument, they departed from Your
10 Honor's claim construction and argued that it wasn't
11 necessary; that all they had to do was have a field type.

12 THE COURT: Thank you.

13 Response?

14 MR. STEVENSON: Well, Your Honor, I think
15 historically what Mr. Van Nest is telling the Court
16 isn't quite right. This issue came up originally in the
17 Markman Hearing. And the defendants were arguing that
18 the receiver had to be able to actively select between
19 different types of feedback messages, and they tried to
20 argue that as part of the claim construction.

21 And what you can see on the screen is
22 part of the claim construction order where the Court
23 says: Plaintiff's first objection to defendants'
24 proposed construction is that it requires the type of
25 feedback response to be actively selected from multiple

1 available feedback responses, which we argued would
2 import an entirely additional step, the step of
3 selecting into the claim, violating the canons of claim
4 construction.

5 So what we said at Markman really clearly
6 was the accused device doesn't have to actively select.
7 They are trying to read that in.

8 The Court in the next -- or later in the
9 order said: Defendants' proposed construction seems to
10 fall on the side of reading limitations into the claims
11 rather than reading the claims in light of the
12 specification.

13 So then we come close to trial, and the
14 defendants filed a motion to confirm, which is this next
15 slide. They basically asked the Court to confirm its
16 claim construction. And I think they were worried about
17 our expert had a disagreement with their expert over
18 application of the claim, and they were seeking
19 essentially a renewed or more granular claim
20 construction from the Court trying to revisit the
21 selection point.

22 And we responded. Here is our response.
23 We said essentially to the Court here is what we are
24 going to be arguing, here is what we will be telling the
25 jury. We think it is a fact issue. What we said is,

1 even if defendants hard-code their products to always
2 choose compressed BlockAck -- which is what the
3 defendants have argued -- that does not negate
4 infringement.

5 Each compressed BlockAck message sent by
6 an accused device is generated in response to received
7 packets. In addition, each compressed BlockAck message
8 contains a BA control field, and that field acts as a
9 type identifier field because it identifies which of the
10 three block acknowledgement variants the device is
11 using. So even if the accused devices always choose a
12 single BlockAck variant, they infringe.

13 That is how we responded. And we went on
14 to say that we have consistently taken this position.

15 Now, after the defendants got our
16 response, they filed a paper with the Court, their reply
17 brief.

18 What they said to the Court was, well,
19 now that Ericsson has confirmed, it will not take a
20 position inconsistent with the Court's claim
21 construction -- that is after seeing what we told them
22 our theory was -- or its assertions during the Markman
23 proceedings. The only remaining issues appears to be
24 disputes of fact.

25 Ericsson's allegations regarding the

1 operation of defendants' products and the particular
2 implementation of the 802.11 standards at issue in those
3 products, are issues of fact for the jury.

4 And they went on to say in their reply:
5 Defendants do not seek summary judgment or to strike
6 Ericsson's expert who remains free to testify as to his
7 opinions about the import of how defendants' products
8 operate.

9 So at the end of the day what happened is
10 this came up before the Court. The defendants chose not
11 to seek a claim construction under 02 Micro. They
12 didn't want to get more granular on it.

13 After we told them exactly what our
14 theory was and we presented exactly the same evidence
15 and theory to the jury, having told the Court we don't
16 need a more detailed claim construction; we don't need
17 to address this, it is a fact issue for the jury; we are
18 not going to seek summary judgment; we are not going to
19 try to prevail as a matter of law; and we are not going
20 to try to strike Ericsson's expert, having lost the jury
21 verdict --

22 THE COURT: What is your response to
23 their argument, well, but Dr. Nettles testified
24 consistent with our position?

25 MR. STEVENSON: Well, I think for the

1 JMWL standard there is testimony on both sides. And
2 obviously Mr. Van Nest has pointed to one Q and A --
3 which I disagree with the import of -- but throughout
4 the direct examination, Dr. Nettles said if they use a
5 type identifier field that indicates back in the
6 standard which one of certain variants they have chosen,
7 that is infringement.

8 In fact, there is a -- let me show you
9 what Dr. Nettles said about that. I asked him the
10 question: If defendants here are using the compressed
11 block acknowledgement option from the standard, why do
12 they need to transmit those two bits, that field, the
13 type identifier field that they're all using the
14 compressed BlockAck?

15 And he said: Yes, sir, in 802.11, and
16 that's what they're transmitting, it's actually the
17 multi-TID and compressed BlockAck field, they need to
18 transmit that because there's a possibility that some
19 other manufacturer will be transmitting some other value
20 in that field; and they need to check that field to make
21 sure that their products are processing BlockAcks --
22 that their products understand how to deal with it. So
23 it is important to process that field even though they
24 don't change it.

25 Dr. Nettles said in his testimony

1 repeatedly that there is infringement because the way he
2 mapped the claim was when they used the type identifier,
3 even though they choose the same one every time, it has
4 got to be received by a receiver which needs to then map
5 it to the variations in the standard. So that is
6 infringement when they put that type identifier in
7 there.

8 THE COURT: Okay.

9 Response?

10 MR. VAN NEST: Your Honor, two points.

11 One, they stipulated in connection with the trial that
12 the patent enables devices to choose between different
13 feedback responses. And when we got Dr. Nettles on the
14 stand, he conceded that he understood Your Honor's claim
15 construction in exactly that way.

16 THE COURT: Okay. Let me stop you right
17 there. What is your response to the stipulation
18 argument?

19 MR. STEVENSON: That is not the
20 stipulation we made. The email that was sent, in
21 connection with them withdrawing their motion and making
22 the representation to the Court that this is a jury
23 issue, says that devices have a choice; and that choice
24 is in the standard.

25 The disagreement between the parties is,

1 is we have taken consistently the position that the
2 standard gives a choice to the receiver about what to
3 transmit. All the choices don't necessarily have to be
4 hard-coded into that receiver for infringement as long
5 as it puts a type identifier field in there, and that
6 type identifier links back up to choices within the
7 standard.

8 What the defendants want to argue -- and
9 this is not in the stipulation and it is not in Nettles'
10 testimony is, they want to argue that all of the choices
11 have to be coded into the receiver, which then has to
12 select between these choices.

13 We have never, ever stipulated to that
14 and, in fact, that is what they lost at Markman.

15 THE COURT: Okay. Final word.

16 MR. VAN NEST: Your Honor, two points.
17 Again, the stipulation is crystal clear. The debate at
18 Markman was whether or not we would have additional
19 language talking about the advantages of the invention.
20 That is what the debate at Markman was about.

21 They stipulated that the device had to
22 choose -- I think Your Honor knows from the trial that
23 the standard and those other various choices, they are
24 not implemented by any of the defendant devices. It is
25 clear that they are conceding that the only type of

1 feedback that can ever be sent by an 802.11 device is
2 this compressed BlockAck. The other options in the
3 standard were never implemented --

4 THE COURT: Excuse me. What is your
5 response that there -- to Dr. Nettles' testimony about
6 it has to be there in case another manufacturer?

7 MR. VAN NEST: That may well be true,
8 although he didn't present any evidence of that. There
9 is no evidence that that is ever done. They didn't
10 present a single other manufacturer that is doing that,
11 number one.

12 And, number two, it doesn't matter
13 because if he concedes that the device has to have the
14 capability to generate multiple types of
15 acknowledgements, they concede that as not satisfied.
16 They concede that. It only generates the one. And
17 there is no evidence to the contrary. And the other
18 potential types of feedback responses that the standard
19 allows are not in the devices. They weren't
20 implemented, and it is the devices that are accused.
21 Not the standard.

22 THE COURT: Okay. Let's move on to the
23 next one, '568.

24 MR. VAN NEST: With respect to the '568,
25 Your Honor, you will recall, this is the patent that we

1 all referred to as the service type identifier patent.
2 And, again, the parties don't dispute how the devices
3 operate.

4 What was accused here was the so-called
5 TID value, the transport identifier value -- traffic
6 identifier value; and it was established in the trial,
7 no debate, that it only does one thing. It only
8 establishes a priority. It never identifies the type of
9 information in the payload to the receiver or the
10 transmitter in the device. And based on that, there is
11 no infringement and no evidence to support the verdict.

12 So here is Your Honor's claim
13 construction: A service type identifier which
14 identifies a type of payload information. And you were
15 clear: The identifier that identifies the type of
16 information conveyed in the payload. And you gave some
17 examples.

18 Now, since they are only accusing one
19 thing, this TID value, that means the TID value has to
20 meet this requirement. It has to identify the type of
21 information conveyed in the payload.

22 And Your Honor made clear in overruling
23 plaintiff's objections to this, that this service type
24 identifier has to inform the device of what is in the
25 payload. This is from your order overruling their

1 objection.

2 THE COURT: Mr. Van Nest, doesn't it,
3 although perhaps not 100 percent of the time but a large
4 percentage of the time, do just that, inform the mobile
5 or base station?

6 MR. VAN NEST: No, this is what -- this
7 is what Dr. Nettles conceded over and over. TID values
8 determine how the data is to be treated. They establish
9 the transmission queue. They don't necessarily reflect
10 the type of data in the payload, right? Right.

11 THE COURT: But from an informative
12 standpoint, isn't it normally video, voice, or
13 corresponding to the same number?

14 MR. VAN NEST: No. No. What he went on
15 to say, and this is a key admission, was someone running
16 voice, they can assign a 7, a 5, a 1, a 2, or anything
17 they want.

18 THE COURT: They can, but do they?

19 MR. VAN NEST: Well, in the one example
20 he gave, they do because in the one example he gave
21 which was from this Ekiga testing, in Ekiga he testified
22 that he ran video through it, and sometimes the TID
23 value was a 5 and sometimes it was a 0.

24 Now, the important thing, Your Honor, is
25 that whether or not an application designates it, the

1 claim construction requires that the value identify to
2 the device what is in the payload so that the device can
3 act appropriately.

4 It is undisputed that this
5 element -- this feature never does that. All it does is
6 say 5 goes in this transmission queue, 7 goes in this
7 transmission queue, 2 goes in this transmission queue.
8 And it doesn't matter whether it is voice, video,
9 multimedia, or something else.

10 That was undisputed, now that we are
11 through the trial, that the device never learns, neither
12 the transmitter nor the receiver. And what Your Honor's
13 claim construction requires is that the TID value itself
14 identify what is in the payload. It doesn't do that,
15 because the device is set up so that it doesn't matter.
16 The device is set up to save a step, as Dr. Kitchen
17 testified, Gibson testified.

18 And there is no dispute that the device
19 is set up so that if there is a 5, it doesn't matter
20 what is in the payload, it goes in a particular
21 transmission queue. If there is a 2, it doesn't matter
22 what is in the payload, it goes in a different queue.

23 Since Your Honor's claim construction
24 requires that this value identify the type of
25 information in the payload, then this admission from Dr.

1 Nettles is critical.

2 The values determine how the data is
3 going to be treated, but they don't reflect the type of
4 data that is in the payload.

5 THE COURT: You left a word out there,
6 "necessarily."

7 MR. VAN NEST: That's right. And --
8 well, take a look at this one. I said: Someone running
9 voice, they can assign anything. And then I said: As
10 you told me last week point blank, that's why a system,
11 an 802.11n system cannot determine from the TID value
12 whether the data in the payload is video, voice,
13 Internet, or multimedia. It can't determine it. Why?
14 Because the only function of that value is to establish
15 a transmission queue.

16 This is an admission of non-infringement,
17 Your Honor. He is admitting that because you can use
18 any number you want and there is no requirement that any
19 particular number be used with any particular type of
20 data, nothing in the operation of the device ever
21 informs the transmitter or the receiver as to the type
22 of information in the payload because we have a
23 different system.

24 THE COURT: Is there any other testimony
25 by Dr. Nettles or other, that would contradict what he

1 said there?

2 MR. VAN NEST: No.

3 THE COURT: Response --

4 MR. VAN NEST: There is none. There is
5 testing data where he got up here on direct and said,
6 well, I tested Ekiga. That's the only test results he
7 presented. He said I tested -- and I think it was
8 video -- and I got a 5.

9 On cross he conceded he got a 5, and he
10 also got a 0. And then I said -- and this is the next
11 admission, Your Honor, after he conceded that sometimes
12 the value was 0 -- I said in the last Q and A: Doesn't
13 that just prove what you told me last week, which is
14 that an application can assign any TID value it wants,
15 to any kind of data?

16 Yes, it can.

17 There is no contradiction to that. There
18 is no evidence that the transmitter or the receiver are
19 ever told what is the type of information in the payload
20 and what it is. They are only told put it in queue
21 number 1, put it in queue number 3, put it in queue
22 number 5 no matter what it is, because as Dr. Kitchen
23 testified, that takes out a step.

24 THE COURT: Thank you.

25 Response?

1 MR. STEVENSON: There is evidence that
2 Mr. Van Nest hasn't presented that contradicts this and
3 expounds upon it.

4 Let me direct you to, first, which is
5 during Dr. Nettles direct, I went through with him the
6 applications that actually use this feature.

7 Now, interestingly, this is an apparatus
8 claim. And the apparatus to infringe needs merely be
9 capable of transmitting a type identifier field that
10 identifies the payload. And it is undisputed and nobody
11 has ever disagreed that in every single MAC frame that
12 is sent, they have to have the type identifier field.
13 That TID value is in every single one.

14 We also showed them over and above the
15 proof of capability, that it is actually used. And we
16 gave a number of actual applications. So Ekiga is one
17 of them. But there is others. CSipSimple -- so this is
18 a question and answer.

19 Which ones have you identified that use
20 this capability?

21 Well, one example would be a program
22 called CSipSimple which runs on Android phones.

23 I kept going on and went down the list:
24 Are you aware of others that run on computers that take
25 advantage of this capability?

1 Yes, sir, the Skype program that I
2 mentioned before and a program called Ekiga when running
3 on Linux takes advantage of these capabilities.

4 So we have got two more programs, Skype
5 and Ekiga.

6 I asked about Windows: Does Windows have
7 programs that take advantage of the capability?

8 Yes, sir. Under Windows 7 and 8,
9 actually, there is a facility QA -- it should be
10 Q-Wave -- that once you start it, Windows Media will
11 take advantage of the quality of service to, for
12 example, stream video to an Xbox using quality of
13 service.

14 Then on cross-examination I asked Dr.
15 Gibson about this. And you may recall he had testified
16 on direct that he didn't think anything used this. I
17 got up on cross and I said: Well, Dr. Gibson, hang on a
18 second. Didn't you, in fact, personally run a test with
19 Ekiga where Ekiga used the TID value of 5 for the video
20 conference it was having?

21 And we went through. He looked at his
22 report. He couldn't remember it. We showed him a page
23 from his report. And then it dawned on him: Yeah, I
24 did do a test, and it did work.

25 And this is the Q and A -- or the Q and

1 A's: What you wrote here --

2 THE COURT: I have read that. Thank
3 you.

4 Response?

5 MR. VAN NEST: Your Honor, the key is,
6 two things. One, it doesn't matter what these
7 applications do because it is undisputed that no matter
8 what they do, the TID value never identifies what is in
9 the payload as part of the operation of the device.

10 THE COURT: What is your response,
11 though, to all this other testimony where you had said,
12 no, this is all that Dr. Nettles said? Why isn't this
13 just a fact question for the jury to determine? I mean,
14 granted you have got some, as in any cross-examination
15 by a good lawyer, you have got some good stuff on your
16 cross; but there is lots of other evidence going the
17 other way.

18 MR. VAN NEST: There isn't any, Your
19 Honor. Two points. Again, all those other
20 applications -- which they presented no evidence on, by
21 the way. There were no test results presented on any of
22 those --

23 THE COURT: Isn't his testimony not
24 evidence?

25 MR. VAN NEST: The testimony is they use

1 the feature. They didn't show that in any of those,
2 including Ekiga that when they used the number, that it
3 then identified what is in the payload. All the number
4 does is set a transmission queue. That is it.

5 This is why this admission is so key.
6 There is no contradiction to this. They are talking
7 about something that doesn't make a difference. You can
8 use numbers all day long. Your claim construction
9 requires that the number identify what is in the
10 payload, Your Honor, to the system.

11 THE COURT: What is your response to
12 their argument that since this is an apparatus claim,
13 you are talking capability?

14 MR. VAN NEST: Two things. One, they
15 have to prove the capability, which they didn't do.
16 And, number two, there is no capability for the TID
17 value to identify what is in the payload.

18 Dr. -- Mr. Kitchen and all of the
19 witnesses, including Nettles, concede that the way the
20 TID value works in the devices, it establishes a
21 transmission queue.

22 The patent requires that you actually
23 tell the device: I have got video data in the payload
24 so you have to treat it this way. Or I have got voice
25 data in the payload, so you have to treat it that way.

1 As the witnesses all testified, the older
2 devices encrypted this stuff so that the device itself
3 had to be told what is in the payload. 802.11n devices
4 don't do that. There is no fact dispute about that.

5 So it doesn't matter whether there are 50
6 applications out there where people are assigning
7 numbers because those numbers still only do one thing.
8 They identify a transmission queue which is how the data
9 is to be treated. They never tell the system what is in
10 the payload; that it is voice, video, or otherwise.

11 THE COURT: Response? Final word.

12 MR. STEVENSON: The only final word, Your
13 Honor, is that Mr. Van Nest has identified a couple
14 portions of the transcript, one asking necessarily; the
15 other asking, well, if somebody kind of got in the
16 system and tricked around with the numbers, couldn't
17 they send any number they wanted to through the Wi-Fi
18 regardless of what the data was?

19 But that doesn't, for the purposes of
20 JMOL, contradict and render as having no weight all of
21 the other evidence of actual use that Dr. Nettles
22 testified about, the actual use of it that Dr. Gibson
23 testified about on cross.

24 And then, finally, the final point is in
25 response to Mr. Van Nest saying, well, the numbers are

1 just numbers, they don't matter, why does the standard
2 and why does Intel in their developer notes identify
3 those as voice and video if the numbers aren't supposed
4 to be used for voice and video? That is a reasonable
5 inference that the jury could have drawn from the
6 evidence.

7 THE COURT: I'd like to hear a response
8 to that.

9 MR. VAN NEST: I will give you a
10 response, Your Honor, which is the following: Everyone
11 testified that the table he is referring to was
12 illustrative and not required, and the system doesn't
13 require you use those.

14 And here is the admission that puts the
15 light to that, Dr. Nettles concedes that because anybody
16 can use anything, that is why an 802.11n system cannot
17 determine from the TID value whether the data is video,
18 voice, Internet -- there is no qualification. It is not
19 necessarily, it not always, it is not sometimes. He has
20 admitted -- and it is true -- the system itself can
21 never determine what is in the payload from the TID
22 value because there is no capability for the system to
23 make that identification.

24 It doesn't matter what the application
25 assigns to the data, the system is never told it is

1 voice. The system is only told, put it in transmission
2 queue 2; and Nettles conceded that repeatedly and every
3 other witness testified to it, and there is no contrary
4 testimony.

5 THE COURT: Okay. Thank you.

6 Let's go to the '625.

7 MR. VAN NEST: Your Honor, Ericsson's
8 position on the '625 is simply nonsense. And I don't
9 say that lightly. It is nonsense. The undisputed
10 evidence on the '625 and about how the device operates
11 makes very, very clear that that is -- that we are
12 playing word games here. This is the patent that we all
13 called the command to receive.

14 And the patent provides a very specific
15 solution to this problem of deadlock in transmission.
16 The transmitter is required to send a command to the
17 receiver to receive a packet that it would otherwise
18 reject.

19 Now, the defendants' products don't use a
20 command. The undisputed testimony was that the
21 defendants' products found a completely different
22 solution. They opened up the receiver so that it will
23 take any packet at any time in any order under any
24 situation without a command of any kind.

25 And once Ericsson recognized that fully

1 and once Ericsson recognized that their expert had
2 conceded non-infringement, they suddenly took the
3 position, oh, wait a minute. This is not about the
4 receiver sending a command -- excuse me. This is not
5 about the transmitter sending a command. It is about
6 how you program the receiver. And I think when we see
7 the progression of this, it becomes more clear.

8 Here is the claim language, Your Honor.
9 The claim is crystal clear that the transmitter has to
10 command the receiver to do something. And that requires
11 a specific command sent from the transmitter to force
12 the receiver to take something out of order that it
13 wouldn't otherwise take.

14 Now, the claim construction -- excuse
15 me -- the patent was crystal clear that an ordinary data
16 packet that has data and a header and a sequence number,
17 is not a command. It is in the prior art. It is out
18 there. It can't possibly be the invention. And they
19 conceded that repeatedly.

20 But now that -- once Nettles realized
21 that, hey, that is all these guys are sending, they are
22 only sending ordinary data packets, he reversed field
23 and said, so in your world every single packet that
24 carries data is a command.

25 In their version, Your Honor, there is no

1 longer any packet that is not a command. Every single
2 one is a command. That is not what the patent requires.
3 The patent requires sending a command to receive
4 something out of order.

5 Now, we asked Dr. Nettles: Would you
6 agree with the statement that a receiver in an 802.11
7 device is always ready to go?

8 Yes, it is.

9 And that is because it has the green
10 light to take packets in any order inside or outside the
11 window?

12 That's right.

13 That is a fundamentally different
14 solution to this problem. That is not a solution that
15 requires you to change the command, change the packet
16 and add an enforcement bit or some other technique to
17 force it. That is changing on the receiver side to
18 eliminate the deadlock problem in a fundamentally
19 different way.

20 And they admitted that. Dr. Nettles and
21 the inventors admitted over and over -- and this is
22 before they understood where the devices were; that if
23 you had a receiver that would accept any packet, you
24 don't need a command. That is what they said.

25 Dr. Nettles says here: Okay. And you

1 also said that if a receiver could already receive a
2 packet, you wouldn't need a command to receive it,
3 right?

4 Right.

5 QUESTION: Now, I take it if the door is
6 always open -- that is the receiver we were talking
7 about and the so-called grocery store door -- you don't
8 need a command to open it?

9 I would agree with that.

10 This points out, Your Honor, this
11 fundamental point that creating an open receiver that
12 will take any packet in any order, is a fundamentally
13 different approach to the problem than the approach
14 required by the patent, which is a transmitter
15 commanding the receiver. That is what the patent is all
16 about.

17 Now, once this -- once the import of all
18 these admissions dawned on them, they ran from the
19 patent like rats from a fire. Right? They said, wait a
20 minute, this patent is now all about programming the
21 receivers and programming the devices with commands that
22 can make the packets act as commands.

23 He said the '625 patent came along and
24 put logic, it put rules in the receiver through
25 programming.

1 Your Honor, this patent, as I have
2 pointed out a couple of times, is not about what you do
3 with the receiver. It is about creating a command from
4 the transmitter to overcome a receiver which has rules
5 about what it takes and in what order. That is what
6 creates the deadlock. The old style of receivers were
7 set up so they could only take packets in a particular
8 order; and if they didn't get it, they rejected the
9 patent. That is the deadlock situation. And the
10 solution in the patent is a command.

11 And you recall, Your Honor, from the
12 testimony the only example anywhere in the patent is
13 using an enforcement bit with a standard packet, to
14 create a command.

15 THE COURT: Okay.

16 MR. VAN NEST: It's not about the
17 receiver.

18 THE COURT: Thank you.

19 All right. Mr. Stevenson, how can a
20 receiver making a decision to accept all packets,
21 constitute a command from the transmitter?

22 MR. STEVENSON: Because of the
23 programming that is put into it under the protocol. If
24 the system is programmed such that the receiver is
25 required to accept out-of-sequence packets, then sending

1 the packet out of sequence that must be accepted, is
2 invocation of the command that is in there. That is
3 exactly what Dr. Nettles said on direct.

4 We asked him: What have you found that
5 satisfies the receive at least one packet having a
6 sequence number out of sequence?

7 That is met when you send an MPDU -- that
8 is a single packet or an A-MPDU -- that's a group of
9 packets -- which is not consecutive with a previously
10 delivered packet.

11 Okay. What makes that a command?

12 Well, the system doesn't have any choice
13 about whether or not to accept that packet or not. It
14 is required to do it. That is what makes it a command.

15 Now, what is interesting is this --

16 THE COURT: But is that the transmitter
17 submitting a command to receive, or is that the system
18 being designed to accept all packets?

19 MR. STEVENSON: It is the system being
20 designed such that the receiver is required to accept an
21 out-of-sequence packet being transmitted by the
22 transmitter.

23 In addition, though, not all packets that
24 are out of sequence have to be received. In other
25 words, if something is transmitted below the

1 transmission window, then that isn't received.

2 So it is wrong for them to say it is
3 always a green light 100 percent of the time. It is a
4 green light if it is within the window or above the
5 transmission window. And that is because of the
6 programming that is in the receivers in all of the
7 chips.

8 THE COURT: But isn't that all on the
9 receiver where the claim calls for it to be in the
10 transmitter?

11 MR. STEVENSON: Well, both -- all of the
12 chips are receivers and transmitters. So every chip in
13 an 802.11 has a receiver and a transmitter
14 functionality.

15 And then what happens is if the receiver
16 logic is coded such that you have to receive
17 out-of-sequence packets, then when the transmitter which
18 has that same coding and knows the protocol sends a
19 packet to the receiver, it is invoking and commanding
20 the receiver to accept it. It doesn't have a choice.
21 That is why it is a command.

22 What is interesting is this is almost
23 identical, except for one bit, almost identical to the
24 preferred embodiment.

25 And we talked about that at trial with

1 the jury. In the preferred embodiment of the patent,
2 there is an enforcement bit. It is either a 1 or a 0.
3 Here is what Dr. Nettles said about it.

4 And in the case of defendants, do they
5 program in their receivers to make decisions about
6 packets?

7 Yes, sir. Of course, they have to.

8 I asked him: What kind of parallels can
9 you draw between the preferred embodiment and what the
10 defendants are doing?

11 He said: Well, the most obvious parallel
12 is, you could imagine that you always set the bit to 1.

13 So let me back up and stop here and
14 explain what the preferred embodiment is.

15 In the preferred embodiment, with every
16 packet there is either a 1 or a 0 with it called an
17 enforcement bit. If it is a 1, it is accepted out of
18 sequence. If it is a 0, it is not accepted. That is
19 it.

20 And then in the preferred embodiment the
21 system has to rely on programming that is contained
22 within the receiver, to make the logical decisions.

23 So it is false to suggest that you can't
24 consider in evaluating whether something is a command,
25 the pre-existing logic that has to be built into every

1 one of these devices because they are all playing by
2 exactly the same rules.

3 So with that in mind, what Dr. Nettles
4 says is, so every packet is a command in the preferred
5 embodiment; and then he says not just the ones you set
6 to 1.

7 So what he says is if there was always a
8 1, then every packet would be a command; and that would
9 be just what the defendants are doing.

10 And I asked him: If they are always
11 doing that -- excuse me -- if they are doing that --
12 meaning always set the bit to 1 -- why bother
13 transmitting the bit anymore?

14 Well, exactly. Once you decide it's
15 always a 1, you don't need to transmit it. And now you
16 have exactly the system that we're talking about in the
17 accused products.

18 So if you took the preferred embodiment
19 and decided we want to take every packet out of sequence,
20 instead of setting a 1 every time, all you have to do is
21 eliminate that bit and tell the receiver in its
22 commands, just pretend you are always getting a 1, we
23 are going to take every packet out of sequence, that is
24 exactly what the defendants are doing, and it is within
25 the claims.

1 THE COURT: Final word, Mr. Van Nest.

2 MR. VAN NEST: Your Honor, you have it
3 right, and he didn't answer your question. The patent
4 is about doing something on the transmitter side --

5 THE COURT: Well, what about the scenario
6 he just went through about the preferred embodiment
7 having the 1 or the 0; but that the logic is on the
8 receiver end that interprets that? So if you are always
9 going to send a 1, if that is the protocol you set up,
10 then why even send a 1 or a 0?

11 MR. VAN NEST: The only preferred
12 embodiment, Your Honor, involved a specific enforcement
13 bit that was set in the command from the transmitter.

14 THE COURT: Okay. But it is not limited
15 to that preferred embodiment.

16 MR. VAN NEST: No, but there is
17 absolutely no evidence and he hasn't provided any --

18 THE COURT: Isn't that evidence that this
19 command is somewhat defined on the receiver?

20 MR. VAN NEST: No, no, you could -- for
21 this reason, the admission I have got on the screen:
22 They acknowledge that opening up the receiver to accept
23 any packet in any order is designing the receiver to
24 avoid a command. You don't need a command anymore.

25 You only need a command if you have a

1 receiver that is insisting on specific rules.

2 Nettles admits that if you have a
3 receiver that can already receive a packet, you don't
4 need a command to receive it?

5 That's right.

6 And you will remember, Your Honor, we
7 presented testimony from two of inventors to the same
8 effect; that opening up the receiver is a totally
9 different approach to a system where you use a
10 transmitter to send a specific command because the
11 receiver won't otherwise take it.

12 You can't turn a cat into a dog by
13 calling it a cat. There is -- one way to solve it is
14 sending a command, which is the way that the patent
15 requires. Another way to solve deadlock is to change
16 the receiver. That is what the defendants did. They
17 don't have a patent on that. This is their patent, Your
18 Honor.

19 Their patent is on a transmitter that
20 commands the receiver to receive a packet having a
21 sequence number that is not consecutive. You don't need
22 a command, and one is never sent in an 802.11n device
23 because the receiver is programmed to take any packet at
24 any time in any order. That is a fundamentally
25 different approach to the problem.

1 And why have they acknowledged that
2 because they acknowledge that? Because they acknowledge
3 that if you had a receiver that was always ready to go
4 and a receiver that could take any packet, you don't
5 need a command. And that is how our devices are set up.
6 Absolutely no dispute about it.

7 THE COURT: All right. Thank you.

8 Anything further on infringement?

9 MR. VAN NEST: No, Your Honor.

10 THE COURT: All right. Let's go to
11 validity.

12 MR. VAN NEST: I am going to -- unless
13 the Court has questions with respect to validity of the
14 '625 or the '435, we are prepared to submit that on the
15 briefing.

16 THE COURT: Is that acceptable?

17 MR. STEVENSON: Acceptable.

18 THE COURT: All right. Very well.

19 Then let's go to the defendants' renewed
20 motion for judgment as a matter of law regarding
21 damages, Docket No. 529.

22 MR. DAUCHOT: Good morning, Your Honor.

23 THE COURT: Good morning.

24 MR. DAUCHOT: Luke Dauchot on behalf of
25 Intel, but I do speak on behalf of all of the defendants

1 for the purposes of this.

2 I think on the damages side, Your Honor,
3 the jury damage award, the defendants are fine with
4 leaving it as to the briefs.

5 THE COURT: Okay. Very good.

6 Is that acceptable to plaintiffs?

7 MR. CAMPBELL: Yes, Your Honor.

8 THE COURT: All right. Then that leaves
9 us with defendants' motion for judgment on post-trial
10 proposed findings of fact and conclusions of law, 588
11 and defendants' post-trial proposed findings of fact and
12 conclusions of law, Docket No. 539, dealing with the
13 RAND.

14 MR. DAUCHOT: That is correct, Your
15 Honor. And with respect to this motion, I am going to
16 be splitting the argument with my colleague Mr. Alper,
17 if that is okay with the Court.

18 THE COURT: All right.

19 MR. DAUCHOT: So we have some slides.
20 And I think hard copies were submitted to the Court and
21 Opposing Counsel.

22 Let me begin, if we can flip to the
23 second one.

24 Exactly what are we asking for here, Your
25 Honor? I know quite a bit of paper has been submitted

1 on the issue. And we thought it might be helpful to
2 help crystallize this. And the defendants are
3 essentially looking for five points here.

4 Number one, specifically with respect to
5 Intel, the chip makers really, a finding that Ericsson
6 has a duty to offer a RAND license to the chip makers.

7 THE COURT: Okay. On that one do you
8 have any legal authority that says that?

9 MR. DAUCHOT: Sure, Your Honor. What we
10 have -- we have the two -- I was going to get into that
11 in a little bit. We certainly have the letters of
12 assurances that as a matter of fact and law applying
13 contract law to it, certainly establish an obligation on
14 the part of Ericsson to offer the chip makers licenses,
15 RAND licenses on the 802.11 technology that is covered
16 by the two LOAs. And if Your Honor would indulge me, I
17 will get to that in a second.

18 THE COURT: What about legal authority?

19 MR. DAUCHOT: Well, legal authority, we
20 have the Microsoft case, Judge Robart; and we also have
21 some Ninth Circuit authority for the proposition that
22 these sort of LOAs do bind parties contractually; and
23 that is in the briefing and conclusions of law we have
24 submitted to the Court.

25 THE COURT: Go ahead.

1 MR. DAUCHOT: I don't think, Your Honor,
2 there is any issue as to these LOAs extending to the
3 end-product users. If there is an issue, I am sure we
4 will hear about it.

5 So what is the second thing that the
6 defendants are looking for here, Your Honor? A finding
7 that Ericsson breached its RAND obligations in two
8 respects: Number one, refusing to license the chip
9 makers; and number two refusing to offer a RAND rate.

10 As Your Honor knows, Ericsson's RAND
11 rate --

12 THE COURT: Did they really refuse to
13 license the chip makers, or did they refuse to license
14 the chip makers at the rate that the chip makers wanted?
15 Because can't you make an argument that by offering to
16 license to the end users that would've, in essence,
17 absolved the chip makers for the number of chips they
18 had sold to that end user of any liability?

19 MR. DAUCHOT: All right. Well, two
20 points. Number one, there was an outright refusal to
21 license the chip makers. That was the policy, and we
22 heard testimony from two witnesses in particular on that
23 subject. Ms. Petersson --

24 THE COURT: To directly license them?

25 MR. DAUCHOT: Correct.

1 Now, the LOAs do entitle -- and I will
2 get to that in a second -- do require Ericsson to
3 license directly to the chip makers.

4 Now, in direct response to Your Honor's
5 point, is this some formality? And the answer is an
6 unequivocal no. And we know that from Ericsson's own
7 documents because the very reason -- and I will get to
8 some documents here -- the very reason that Ericsson had
9 its policy not to license chip makers was because
10 Ericsson knew that if it did invite the chip makers into
11 the negotiation room or negotiate directly with the chip
12 makers, that the rate would be lower.

13 The whole policy in avoiding the chip
14 maker was to be able to extract a higher licensing rate
15 than it otherwise could if it dealt with the chip
16 makers.

17 THE COURT: Well, but isn't the converse
18 of that true, the defendants are sort of wanting the
19 reverse of that, they are wanting to negotiate at the
20 chip maker rate rather than at the higher rate?

21 MR. DAUCHOT: That is a fair point, Your
22 Honor. Of course, you have the doctrine of patent
23 exhaustion that plays into that. I think Ericsson is
24 acutely aware of that issue.

25 However, I think the short answer to that

1 is, if, in fact, that was a concern on the part of
2 Ericsson, it should have flat out said in its letter of
3 assurance --

4 And if you could flip to the -- if you
5 could flip to 5, please.

6 If we look at its letter of assurance --
7 and this is the 2003 letter of assurance, and we have a
8 2011 letter of assurance as well.

9 It states: The patent holder -- and that
10 is Ericsson -- is prepared to grant a license to an
11 unrestricted number of applicants. Unrestricted, Your
12 Honor.

13 And the same is true if we flip to 6, the
14 2011 letter of assurance, unrestricted. It did not say
15 that the submitter in the case of the 2011 letter -- or
16 the language in the 2003 letter as a patent holder, was
17 prepared to grant a license to applicants who
18 make -- who happen to be end-product users. There was
19 no limitation.

20 And so Ericsson has to deal with the
21 consequence of the bargain it struck with the IEEE, a
22 bargain to which all of the applicants are third-party
23 beneficiaries.

24 And as an aside -- so that is really the
25 contract theory and the specific performance theory if

1 for some reason the Court finds there is some
2 contractual -- some element that is missing from a
3 contract perspective -- and we don't believe there
4 is -- there is, of course, the promissory estoppel which
5 is the equitable approach to it; and that is a promise
6 made by Ericsson that was intended to induce reliance --
7 and, by the way, the LOAs specifically state that the
8 promise is going to be relied upon and, in fact, do
9 induce --

10 THE COURT: Okay. Let me hear a response
11 to that.

12 MR. CAMPBELL: Your Honor, a couple of
13 responses to that. The whole argument -- the whole
14 argument here has become all about Intel. Okay?

15 And if we could go to Slide 5, please.

16 First of all, Your Honor is absolutely
17 right that a license to the end-product manufacturers
18 would extend to Intel. Obviously, there couldn't be a
19 double-dip here. To follow along on that point before I
20 get to Slide 5, your Honor granted Intel to intervene in
21 this case limited to the products in this case, limited
22 to the accused products in this case sold by the
23 defendants.

24 Intel is now way beyond that. Intel now
25 wants Your Honor to award them a RAND license for all of

1 their chips; not just for the people in this case. So
2 they are way beyond that because the defendants in this
3 case, they are not going to have a problem with those
4 chips.

5 Those chips are, as Your Honor pointed
6 out, effectively licensed by the license to the end
7 product --

8 THE COURT: Let me ask Counsel, is that
9 what you are asking for, for a license for Intel as to
10 all chips, not just the ones involved in this lawsuit?

11 MR. DAUCHOT: Well, we -- yes, Your
12 Honor. We have -- the request is essentially for the
13 Court to set a rate at which Ericsson is required under
14 its LOAs to extend an offer, and it is a worldwide
15 portfolio offer. And that is the way the evidence came
16 in, Your Honor, during the bench trial.

17 THE COURT: Okay. Go ahead.

18 MR. CAMPBELL: So we are well beyond what
19 the Court allowed Intel in for. We are well beyond what
20 the joint pretrial order allows.

21 But if we go to Slide 5, we see Ericsson
22 has offered a license to Intel. The policy is there.
23 There is nothing wrong with the policy. The policy is
24 so that there is defensive patent measures --

25 THE COURT: This was way late in the game

1 though, wasn't it?

2 MR. CAMPBELL: There was an offer in
3 March of 2013, and then there was another offer after
4 the jury's verdict in July of 2013. There is no -- as
5 Judge Robart's found -- there is no, your initial offers
6 don't have to be RAND. You just have to make a RAND
7 offer at some point.

8 Well, Ericsson has offered a license to
9 Intel. And it couldn't be more clear that the letter
10 says Ericsson offers to grant Intel a worldwide license
11 under Ericsson's patents essential to the IEEE 802.11
12 standard at the rate of 50 cents per device.

13 On July 3rd, Ericsson having constantly
14 considered all new information from its licensees, from
15 negotiations, and from this jury's verdict, revised its
16 RAND rate to 35 cents and extended that offer to Intel.
17 So Intel has received --

18 THE COURT: I'm curious. How did you get
19 to 35 cents when the jury came in at 15 cents?

20 MR. CAMPBELL: Well, The jury's award is
21 for three patents, right, the three standard essential
22 patents? Ericsson has more than those three standard
23 essential patents in its portfolio.

24 So 15 cents sets a floor of the RAND
25 rate. It has got to be at least 15 cents. But there is

1 more than that.

2 Now, Mr. Bone testified that he
3 calculated the patents-in-suit to be 25 cents; and that
4 was apportioning 50 percent of the value of the
5 portfolio to the patents in this suit and 50 percent to
6 patents outside it. You take the 25 plus the 15, you
7 are at 40. Ericsson is offering a deal. Instead of 40
8 cents a unit, it is 35 cents a unit for Intel to have a
9 license; and that is only considering the U.S. patents.

10 Of course, there are worldwide patents.
11 Ericsson has patents all over the world. So that is how
12 you get to 35 to 40 cents.

13 You can also get there through the
14 licenses and through testimony from Dr. Perryman. But
15 at the bottom line here we are arguing about giving the
16 chip makers a license. Ericsson has offered Intel a
17 license.

18 What Intel hasn't come back and done
19 seeking specific performance has said, yes, if the Court
20 determines a reasonable RAND rate of 15 cents for the
21 three patents in this case -- because that is what
22 Intel's intervention is limited to -- we will take the
23 license.

24 And they need to do that when they are
25 seeking specific performance. That is the law. They

1 still haven't said that.

2 THE COURT: All right. Response.

3 MR. DAUCHOT: Okay. Your Honor, a couple
4 of points. One on the intervention issue.

5 The intervention order -- to go back in
6 time -- did permit Intel to come in on a limited basis.
7 The issue, though, Your Honor, the issue really was over
8 expanding the scope of the trial from the infringement
9 perspective.

10 At the time that Intel intervened, there
11 were a number of other defendants in here with I think
12 their RAND defenses at the time. This stuff was in
13 play. The limitation in terms of limitation was really
14 geared to protect Ericsson from having to drag in other
15 customers it claimed that it would have a res judicata
16 problem if it didn't and to expand this trial from a
17 products standpoint.

18 The idea really was not to create a limit
19 really, if you will, on the scope -- on the scope of
20 RAND, which, as it turns out, really did not result in
21 the inefficiencies and having Ericsson bring in
22 additional parties to the extent it required -- or it
23 claimed it would have to.

24 Second point. In the joint pretrial
25 order, it is final. And I think Ericsson should stand

1 corrected on that because the joint pretrial order does
2 distinguish between patents-in-suit and patents. And
3 when we are dealing with the RAND issues, the pretrial
4 order does refer to Ericsson's patents; namely, those
5 patents that it agreed to license under its LOAs.

6 Let me shift gears, Your Honor, to this
7 question about Ericsson having actually made an offer to
8 Intel in March of 2013.

9 Now, Your Honor may recall Mr.
10 Brismark's -- well, let's start with Ms. Petersson's
11 testimony on that. Ms. Petersson testified that
12 Ericsson was justified in not -- and I think this is in
13 a slide here. Let me just get to it right here.

14 16, please.

15 Ms. Petersson testified -- and this was
16 really their second excuse. Their first excuse was this
17 downstream reciprocity, which I won't get into, other
18 than to say that it was an excuse, and Ericsson finally
19 abandoned it for trial purposes.

20 Ms. Petersson testified to the jury that
21 Ericsson was justified in pursuing its policy not to
22 license chip makers on the basis that the chips sold by
23 Intel and other chip makers were not, quote, unquote,
24 fully compliant. In support of that, it pointed to its
25 2003 letter of assurance where there is an addendum to

1 the effect that Ericsson commits to license "fully
2 compliant" products.

3 The 2011 letter, Your Honor, has no such
4 addendum. "Fully compliant" does not appear in the 2011
5 letter. In fact, all it states is compliant. I will
6 get to that in a second.

7 But Your Honor may recall that testimony.
8 Then what we had was Ms. Petersson testifying to the
9 jury that Intel -- or that Ericsson had, in fact,
10 extended an offer, a RAND offer to Intel, a license
11 to -- a license, if you will, for Intel's chips.

12 That's what Ms. Petersson testified to
13 the jury.

14 So what we had during Mr. Brismark's
15 testimony, I think you will recall it, Your Honor, is
16 that we actually put the license terms that Ericsson had
17 offered. And lo and behold what did we find? We find
18 that the proposal was basically one to the effect that
19 it would only license "fully compliant" products.

20 Slide 20, please.

21 I have attached a draft of terms for you
22 to consider. Company products shall mean all products
23 that are fully compliant.

24 So Your Honor may recall the question I
25 posed to Mr. Brismark and said, well, wait a second, and

1 this is the offer that Ms. Petersson testified about to
2 the jury, I said is this an illusory license? Is it a
3 license to nothing, given the way Ericsson construes
4 "fully compliant"?

5 And Your Honor may recall Mr. Brismark's
6 response which was: Well, our intention was to keep on
7 negotiating; and at some point in the negotiation
8 process, this matter would get -- you know, we would get
9 to this matter.

10 Well, exactly -- you know, that is a far
11 cry from an offer. In fact, what they have labeled as
12 an offer, is an offer to nothing.

13 And, by the way, Your Honor --

14 Next slide, please.

15 -- it does raise a troubling issue.

16 Either Ericsson's trial testimony concerning the chip
17 offer, Ms. Petersson's testimony, was just false or
18 Ericsson's "fully compliant" excuse that it brought
19 forth both in the bench and the jury trial, is just a
20 ruse. It is one or the other because I don't think
21 Ericsson has ever taken the position that the "fully
22 compliant" language crept into there by accident.

23 So we get to the question, Your Honor --
24 and I'm jumping trying to deal with the specific
25 questions that were dealt with here by Counsel in this

1 35-cent offer. Mr. Alper is going to get into the
2 details of why this 35-cent offer makes no sense.

3 But it is not an offer. It is a
4 letter -- the 35-cent letter looks -- is almost
5 identical to the letter we got in March of 2013 where we
6 had a follow-up and we said, hey, can we have some
7 additional details? And then we got the details. And
8 as it turned out, the devil was in the details. There
9 really was no offer.

10 THE COURT: Has Intel made any
11 counter-proposals?

12 MR. DAUCHOT: We have, Your Honor. We
13 have. Well, counter-proposals --

14 THE COURT: Counter-proposals after the
15 March 13th -- or March 2013 letter or this more recent
16 letter of 35 cents?

17 MR. DAUCHOT: We had -- well, and this
18 gets us into a couple of issues. We had -- there has
19 been a series of communications between Intel and
20 Ericsson that the parties -- that Ericsson has initiated
21 outside the context of the mediation privilege, but
22 there are -- have been other communications that have
23 taken place inside the context of the mediation
24 privilege, so that after we got --

25 THE COURT: So can the Court consider

1 things that happened within the mediation --

2 MR. DAUCHOT: I think -- well, the answer
3 to that, Your Honor, I think is no, not for the purposes
4 of this proceeding.

5 THE COURT: Then let's talk about outside
6 of the mediation?

7 MR. DAUCHOT: Outside the mediation
8 privilege -- and I will specifically reference Your
9 Honor to a series of documents that were introduced as
10 part of the bench trial including Ericsson's
11 communication PX 593, 595 --

12 THE COURT: My question was, has Intel
13 made an offer in response to the March 2013 or this most
14 recent July 2013 --

15 MR. DAUCHOT: There has been no response
16 to the July offer. And in response to the March offer,
17 yes, Intel's position was that the request for 50 cents
18 was way out of bounds.

19 THE COURT: But doesn't even RAND require
20 some give-and-take and some negotiation back and forth.
21 I am hearing you saying that Intel -- is Intel's
22 position still a penny a chip?

23 MR. DAUCHOT: Well, Intel's position is
24 that, generally speaking.

25 THE COURT: All right --

1 MR. DAUCHOT: But the more important
2 point, Your Honor.

3 THE COURT: Okay. Go ahead.

4 MR. DAUCHOT: I'm sorry. Just one point
5 though. From a refusal-to-deal standpoint, though, it
6 is important that we do not have in the record ever a
7 moment -- a point in time when Ericsson did make an
8 offer to a chip.

9 The only thing that Ericsson points to is
10 that April 2013 proposal which has the "fully compliant"
11 language in which Ericsson testified at trial means no
12 chips. There is no offer in the record. And so it is
13 just non-existent. Anyway with that --

14 THE COURT: Response?

15 MR. CAMPBELL: Your Honor, I think the
16 answer to your question was, no, Intel has never made a
17 counter-proposal saying strike this "fully compliant"
18 language and we will sign the deal. If the "fully
19 compliant" language is the issue, we will take it out.

20 An offer has been made twice. Two
21 letters have been sent. We will grant you a license. I
22 don't think RAND obligations are such that you are
23 supposed to come into the court and say, we don't like
24 this language here so that is a violation of RAND. We
25 are going to pick on this language here and this

1 license. Take the "fully compliant" language out, send
2 the license back.

3 I will tell you right now Ericsson will
4 strike the "fully compliant" language if that is the
5 issue. So two letters have been sent offering them a
6 license. The "fully compliant" language was there. It
7 can be taken out.

8 THE COURT: Maybe we have got a deal. If
9 we take the "fully compliant" language out, is that
10 acceptable to Intel?

11 MR. DAUCHOT: Well, Your Honor, you are
12 going to put Judge Faulkner out of business.

13 THE COURT: Well, he hasn't been doing
14 too good of a job.

15 [Laughter.]

16 MR. VAN NEST: I hope that is on the
17 record.

18 THE COURT: I will tell him that myself.

19 [Laughter.]

20 THE COURT: So do we have a deal?

21 MR. DAUCHOT: Well, Your Honor, let me
22 put it this way: I would have to consult with the
23 client.

24 THE COURT: Do you want to take a moment?

25 MR. DAUCHOT: Well, Your Honor, I don't

1 think that we would be prepared to handle that right
2 now. In fact, we don't have -- we don't have all of the
3 terms.

4 My point being this: For the purposes of
5 the RAND bench trial, there are two issues going on
6 here, to sort of bring it back to the fundamentals.

7 What we have is a request for specific
8 performance where Ericsson is ordered to offer a license
9 to everyone on terms, on RAND terms. And the RAND terms
10 are not 50 cents. The RAND terms certainly aren't 35
11 cents.

12 I am actually intrigued by Counsel's
13 position here that, gee, it is not 15 and it is 35
14 because what was tried to the jury was only a portion of
15 Ericsson's portfolio.

16 You may recall, Your Honor, that Mr. Bone
17 justified his apportionment, his, quote, unquote,
18 apportionment -- and we take issue with that -- on the
19 basis that the five patents asserted in this case, the
20 five standard essential patents in this case, were the
21 crown jewels; and that it really didn't matter what
22 their other standard essential patents were.

23 They were sort of neither here nor there.
24 He had spoken with Mr. Brismark and others. And they
25 said, look, these five patents being asserted in this

1 case are it. That is why I don't need to do a
2 full-blown apportionment with respect to those other
3 licenses that cover portfolio-wide, you know, the entire
4 802.11 portfolio.

5 And so for Ericsson to come in now as
6 part of the bench trial and say, gee, we are entitled to
7 ask for 35 instead of 15 because the 15 reflects only a
8 fraction of our portfolio, gets them into a fundamental
9 bind, as I suspect Your Honor can appreciate. It is
10 basically having your cake and eat it too. So I did
11 want to make that point.

12 But based on the briefing, Your Honor,
13 Your Honor has the authority to establish a RAND rate as
14 a matter of law -- as a matter of specific performance,
15 I should say --

16 THE COURT: What do you say that RAND
17 rate should be?

18 MR. DAUCHOT: 1.7 cents. Something that
19 Mr. Alper can expand upon --

20 THE COURT: What does plaintiff say it
21 should be?

22 MR. CAMPBELL: 35 cents for the worldwide
23 rate. Because of the limited nature of this case, it
24 should be 15 cents for the three patents-at-suit.

25 THE COURT: Y'all are pretty close

1 together?

2 MR. CAMPBELL: We are getting there.

3 Your Honor, if I could, all joking aside,
4 I think Counsel's response was fairly enlightening. I
5 think it points out two things.

6 One, the March 2013 letter is now four
7 months old, and they are still not willing to say, okay,
8 you can take the "fully compliant" out and we don't have
9 an issue there.

10 We are just arguing about language in a
11 contract. That can't be a RAND violation. We will take
12 it out. Okay?

13 Secondly, they are seeking specific
14 performance. They have to be able to come into this
15 Court under the law and say if Your Honor says 15 cents
16 RAND rate for these three patents, we will take a
17 license. We will do our part. We are here. We are
18 ready. We are willing to perform.

19 And Mr. Dauchot just said, well, I have
20 got to talk to my client. I don't know if I can take
21 that or not. If you can't say that, you can't seek
22 specific performance.

23 THE COURT: Okay. Is that correct that
24 you can't say that?

25 MR. DAUCHOT: No, Your Honor, because the

1 specific performance we are requesting is an order
2 having them make an offer. I mean, we are not asking
3 that the Court order us to perform and accept an
4 offer --

5 THE COURT: You are asking the Court to
6 order specific performance that they have made an offer
7 when they have already made two and you haven't
8 responded to either one?

9 MR. DAUCHOT: Well, first -- first --
10 first, Your Honor, it is a question of exactly what is
11 the -- is it even an offer of the chips? The answer to
12 the March one is un -- is, no, based on the record.

13 As far as the July is one, I don't know.

14 On their "fully compliant" point, the
15 "fully compliant" excuse and exactly what they meant by
16 "fully compliant," the definition they aired at trial of
17 what "fully compliant" means -- and you will recall Mr.
18 Brismark's testimony about "fully compliant" -- it is
19 the first we heard of it. That definition is the first
20 we'd heard of what "fully compliant" means.

21 THE COURT: Okay.

22 MR. DAUCHOT: Now, on the point about the
23 specific performance, Your Honor, the question is also
24 one of numbers. The only offer that has been made --
25 let's call it an offer and ignore the fact that they

1 excluded out chips -- was for 50 cents.

2 The jury rejected that. The jury awarded
3 something far less than that. So what they have done is
4 they have revised it to 35 cents. The point is the 35
5 cents is still not part of the record. It was made
6 after trial closed and the evidence was closed.

7 So the record before the Court is one
8 where their offer is one for 50 cents. Our position is
9 that that is not a RAND offer because 50 cents is not --

10 THE COURT: They filed a motion to
11 supplement the record, right?

12 MR. DAUCHOT: They did file a motion to
13 supplement the record.

14 THE COURT: Are you opposed to that?

15 MR. DAUCHOT: We are opposed to that?

16 THE COURT: Why is that?

17 MR. DAUCHOT: Well, we are opposed to
18 that because supplementing the record basically puts us
19 in a position where you now have this 35-cent offer. We
20 have no ability to cross-examine Ericsson on it. We
21 don't know where the number came from. We don't know
22 what the logic is. We can't test it.

23 In fact, the 35-cent offer that they have
24 come up with now and some of the directions that they
25 intend to head in in terms of rationalization,

1 contradict documents that are, in fact, in evidence.

2 THE COURT: But you are asking the Court
3 to set a RAND figure, right?

4 MR. DAUCHOT: Correct.

5 THE COURT: And you are saying it should
6 be to more than just what is involved in this case,
7 right?

8 MR. DAUCHOT: Well, our position is that
9 it is part of this case by virtue of the RAND
10 counterclaim.

11 THE COURT: But the evidence would have
12 reached beyond this case?

13 MR. DAUCHOT: Yes, Your Honor.

14 THE COURT: Okay. But then you are
15 saying, though, that the Court shouldn't consider any
16 evidence that comes before it after the close of
17 evidence in this case?

18 MR. DAUCHOT: I see your point. When we
19 say it reaches beyond the case, I mean, obviously, we
20 have a case in which evidence was collected, positions
21 were taken, parties testified, et cetera, so certainly
22 from that perspective the RAND rate is within this case
23 for the purposes of this case.

24 Now, the -- so the evidence that goes
25 into that analysis, and all of that was part of a bench

1 trial and a jury trial. And our position is that rate
2 can be determined from the evidence that was presented
3 at trial; and, in fact, litigated as part of the bench
4 trial, as well as part of the jury trial. So that is
5 point number one.

6 But that is not to say that whatever rate
7 Your Honor specifically orders them to offer us is a
8 rate that will carry absolutely no repercussions outside
9 of this courtroom or outside the specific confines of
10 this case. That is the point.

11 THE COURT: Okay. Thank you.

12 Final word.

13 MR. CAMPBELL: Well, Your Honor,
14 apparently what Intel is asking for is a one-way street
15 here. Make them offer us a license; and if we like it,
16 we will take it. If we don't like it, we won't take it.

17 If we are talking about a contract here,
18 they have to come in and say if Your Honor says 15 cents
19 for those three patents based on the jury's verdict, we
20 will take a license. They still can't say that.

21 THE COURT: And you still can't say that;
22 is that correct? Or you can?

23 MR. DAUCHOT: Is the question would
24 Intel, in fact, accept an offer that the Court orders
25 Ericsson to make?

1 THE COURT: The Court wouldn't be making
2 an offer. The Court would be setting a rate. And I
3 think his question is whatever that might end up being
4 is Ericsson -- I mean, is Intel as it sits here today
5 telling the Court that it will accept whatever the Court
6 determines, with regard to these three patents.

7 MR. DAUCHOT: And the answer to that
8 question, Your Honor, is, we really do need to consult
9 not only with our own client but with the joint defense
10 group because, as Your Honor knows, the chips that some
11 of the defendants --

12 THE COURT: Well, consult with them and
13 file by, say, noon tomorrow your response in answer to
14 that question, yes or no.

15 MR. DAUCHOT: That's fine, Your Honor.

16 THE COURT: Okay. Thank you.

17 Anything further?

18 MR. CAMPBELL: Finally, yes, Your Honor.
19 We are going outside the bounds of this case. We are
20 going outside what Intel -- this is all about Intel now.
21 It is clear. They want a special deal. We are going
22 outside what the Court allowed them to intervene and
23 what the pretrial order says is to determine the maximum
24 royalty rate that Ericsson can recover as damages in
25 this case by virtue of its RAND obligations.

1 In this case we are now at three patents,
2 15 cents a unit. That is -- the jury was told, consider
3 Ericsson's RAND obligations in setting the rate. So we
4 already know what that rate is. That is the floor. So
5 we are at least at 15 cents. That is what the pretrial
6 order and Your Honor's limited intervention should
7 cover. That is what should be issued.

8 If we are going to go beyond this case,
9 then we ought to consider evidence that has happened
10 after the jury's verdict where Ericsson didn't have the
11 opportunity to consider the jury's verdict, and is now
12 offering a worldwide rate of 35 cents a unit.

13 THE COURT: Okay. All right. Thank
14 you.

15 All right. Anything further with regard
16 to post-trial motions?

17 MR. DAUCHOT: Well, Mr. Alper, if Your
18 Honor is interested, was going to deal with the question
19 of why the 50 cents is not RAND; and he is prepared to
20 deal with that issue.

21 THE COURT: Why the 50 cents is not RAND.
22 Okay. I will hear some very brief argument.

23 MR. ALPER: Your Honor, I will keep this
24 very brief.

25 THE COURT: Okay. Thank you.

1 MR. ALPER: Adam Alper for defendants. I
2 will keep it brief, and I will keep it focused on the
3 issues we were just discussing.

4 And I would like to start with the
5 questions that were just being discussed about the
6 35-cent offer that came over from Ericsson.

7 And what is critical in evaluating that
8 35-cent offer, is 35 cents RAND? Because that is
9 ultimately the question before us, what is exactly RAND?
10 If the 35 cents is not RAND, if it is not something in
11 the ballpark -- as Your Honor mentioned, doesn't RAND
12 require some give and take?

13 Even if that is true, the 35 cents falls
14 well far beyond the give-and-take zone. That is what I
15 want to just address first, and I want to talk briefly
16 how to calculate RAND.

17 If we can go to Slide 40 in our
18 presentation.

19 So we do have an acknowledgment from
20 Ericsson that the jury came back with a rate of 15 cents
21 per unit that reflects their analysis of damages in this
22 case. And, in fact, they say that is RAND. According
23 to Ericsson, they say that is RAND.

24 And the way that they get to 35 cents, as
25 Counsel just mentioned, is that they increase that 15

1 cents to account for the full Ericsson Wi-Fi portfolio,
2 right? And we don't have evidence of the --

3 Withdrawn.

4 We don't have them telling us here what
5 is the value of that portfolio that allows us to more
6 than double that rate; but that is what the general
7 thinking is, is we go ahead and expand it to account for
8 the full portfolio.

9 But when we look at what they have said
10 in this case and what their expert has said about the
11 rest of the portfolio, what we are going to see is they
12 did a meticulous analysis of the remainder of that
13 portfolio, and they have told us the large majority of
14 the value of their Wi-Fi portfolio was in the patents
15 that were in suit that led to that 15-cent royalty.

16 They actually go through all of the other
17 alleged portions of their Wi-Fi portfolio and say there
18 is no value there.

19 So if we go to the next slide.

20 This is excerpts from Ericsson's expert
21 report. Now, this is not part of the record. If Your
22 Honor grants Ericsson's motion to supplement the record
23 with their 35-cent-offer letters, then we would like
24 permission to supplement the record with these excerpts
25 or with excerpts from Ericsson's expert report because

1 he actually tells us that the value of their portfolio
2 was in the patents-in-suit.

3 So you can see it here, this is coming
4 right from their expert. He says: Ericsson believes
5 that the patents-in-suit represent a large majority of
6 the value of the Ericsson 802.11 portfolio.

7 He goes on and starts to go through the
8 rest of their portfolio and he says: Ericsson had
9 little success in licensing what he is calling their
10 Legacy 802.11 patents, that is, patents other than
11 802.11n. He says right there the patents related to
12 11a, 11b, 11g, but not 11n. Had little value.

13 He goes on and analyzes specific patents
14 that were not in suit, one by one. Here is an example.
15 You can see, it says that: Ericsson knew that two of
16 its patents that were part of the Ericsson 11n
17 portfolio -- these are 11n patents that were not in this
18 case, right, were not in the trial -- had little or no
19 economic value.

20 So let's take a step back and look at
21 this 35-cent offer. We have a verdict for 15 cents that
22 reflects the value of the portfolio because we know from
23 Ericsson that the rest of the portfolio has little to no
24 value.

25 THE COURT: I mean, are you agreeing with

1 those statements or disagreeing with those statements?

2 MR. ALPER: We -- we -- yes, we are -- we
3 are -- well, as you know, Your Honor, we have issues
4 with the value of the patents that were in suit; but we
5 agree that the rest of the portfolio has no value.

6 THE COURT: So if the Court should just
7 set a RAND obligation for the patents in this suit, then
8 that would not, in your opinion, create any further
9 significant obligation beyond these patents?

10 MR. ALPER: As a practical matter, that
11 is correct, although it is our position that we are
12 entitled to a license for the whole portfolio. There is
13 no ambiguity as to what remains because Ericsson -- you
14 can see Ericsson is taking a different position now than
15 they were earlier in the case.

16 Earlier in the case the patents-in-suit
17 had all of the value. Now they are saying there is more
18 than double the value in the other patents because we go
19 from 15 cents now to 35 cents.

20 And the point I want to circle back on
21 goes to the issue we are talking about -- Your Honor was
22 talking about with Mr. Dauchot, that is, is 35 cents an
23 actual offer? Is that a bona fide offer?

24 So we kind of take stock of where we are.
25 We have a verdict for 15 cents. We have Ericsson

1 requesting that 15 cents as an ongoing royalty going
2 forward, as their RAND royalty going forward. Right?
3 That is them saying to us and asking the Court to say
4 you guys should pay 15 cents going forward for what we
5 know is the value of the entire portfolio.

6 Then we have this RAND claim where we are
7 saying they are refusing to deal with us. How do they
8 answer that? They send over an offer for 35 cents.

9 THE COURT: Okay.

10 Let me ask you to respond to that.

11 MR. CAMPBELL: I think that is great.

12 Let's take stock at where we are. We have heard
13 repeatedly now 15 cents for three patents. That is RAND
14 rate, so that is the floor. Right?

15 And then we know there is more value.
16 They want to point to statements of large majority. Our
17 expert actually said 50 percent of the value, but we
18 know there is more value above the 15 cents. We know
19 there is more there. Ericsson has offered 35 cents.

20 So somewhere -- maybe 35 cents is the
21 right number, but somewhere above 15 cents is certainly
22 the right number. It is not 1.7 cents. That is where
23 we are. Okay? The jury was asked to consider RAND
24 obligations. That is where we are. They have
25 considered those. We are at 15 cents for three patents.

1 THE COURT: Let me ask Counsel for
2 defendant then, do you agree with that statement that
3 the RAND obligations for the entire standard portfolio
4 would be somewhere between the 15 cents and the 35
5 cents?

6 MR. ALPER: Your Honor, I actually
7 disagree that it would be any sort of material amount
8 above the 15 cents.

9 THE COURT: But you do agree that 15
10 cents would be the floor?

11 MR. ALPER: Well, I actually have two
12 points. If we accept 15 cents as the RAND rate for the
13 patents that are in suit, then 15 cents would be the
14 floor. But we don't accept 15 cents as the RAND rate.
15 After we get done with this issue, I would briefly like
16 to talk about that for a moment.

17 But the -- the -- the -- when it comes to
18 now we start with the patents-in-suit representing the
19 large value of the portfolio and we look at what else is
20 left, right, they are asking for a worldwide license for
21 35 cents. They have no evidence --

22 THE COURT: Well, I understand what they
23 are asking for and that you feel that is unreasonable.
24 But what I am really having trouble with is what is
25 Intel saying is reasonable and what does Intel say is a

1 reasonable rate in light of the jury verdict and
2 everything else?

3 MR. DAUCHOT: Your Honor, Luke Dauchot,
4 if I could expand on one point here.

5 THE COURT: Well, you could -- if you can
6 answer my question, I would appreciate it.

7 MR. DAUCHOT: Well, what is reasonable is
8 1.7, and the question is how do you harmonize that with
9 the jury verdict?

10 THE COURT: Well, if I don't throw out
11 the jury verdict -- let's assume for the sake of this
12 discussion that I don't and the jury verdict was
13 supported by evidence and stands, then what is your
14 position with regard to RAND?

15 MR. DAUCHOT: The position with respect
16 to the jury verdict is as follows: That jury verdict
17 did not find an Intel rate. And if Your Honor will
18 recall --

19 THE COURT: Well, you sure argued an
20 Intel rate, didn't you?

21 MR. DAUCHOT: No, what we argued to the
22 jury -- what we argued to the Court was that Mr. Bone's
23 report and the hypothetical negotiation of
24 George-Pacific was fundamentally flawed because it
25 rested on the premise that Intel would not be -- and for

1 that matter any other chip maker -- would not be in the
2 negotiation room. That is the George-Pacific model --

3 THE COURT: But I thought I remembered a
4 lot of argument and testimony where defendants said that
5 the reasonable RAND rate would be one cent per chip.
6 Did I miss that?

7 MR. DAUCHOT: No, you did not miss that.
8 But the point is, is that the jury verdict was
9 predicated on a George-Pacific model that assumed that
10 you just have the chip makers inside that negotiation
11 room -- that you don't have the chip makers in the
12 negotiation room.

13 And we know, we know that if the Court
14 finds, as the Court from our perspective should find,
15 that the LOAs impose on Ericsson an obligation to deal
16 with the chip makers.

17 Ericsson admits in its internal
18 documents --

19 THE COURT: But are you saying deal with
20 the chip makers to the exclusion of the other downstream
21 manufacturers?

22 Well, not necessarily. The other
23 downstream manufacturers can be at the table. What we
24 do know is that ultimately if Intel -- if the chip
25 makers do get a license, you do have patent

1 exhaustion --

2 THE COURT: And if the downstream people
3 get a license, you, likewise, have patent exhaustion,
4 right?

5 MR. DAUCHOT: No. Patent exhaustion
6 won't work up that way. The best that Ericsson can say
7 is we are not going to sue you, Intel, by virtue of
8 whether -- two points there.

9 Number one, if -- in a world, in a
10 hypothetical world -- or in a natural world where they
11 are only negotiating with the end product -- the
12 customers, and we are not part of it and they are not
13 dealing with us, a number of customers, as came out
14 during trial, have indemnification obligation.

15 So there is precious little economic
16 incentive on the part of those customers to negotiate
17 the sort of deals that Intel and other chip makers would
18 be dealing with as they are entitled to do under these
19 LOAs. That is point number one.

20 Point number two, the best that we have
21 is these customers have a have-made right. They have a
22 right to have the chips made. But I am not sure and I
23 haven't researched this personally, Your Honor, so I am
24 not going to be making representations to the Court, but
25 I don't know that that necessarily translates into no

1 legal exposure from a chip maker standpoint. I just
2 don't know one way or the other.

3 What I do know is that Ericsson has not
4 extended the chip makers an offer; and that that
5 refusal -- and Ericsson admits this inside its own
6 documents that the whole reason for the policy --
7 remember the big dollar, little dollar sign and all of
8 that, why are we chasing after the customers? Because
9 there is more money to be made there than Intel.

10 We do know that that refusal to deal with
11 us results in economic prejudice and results in a rate
12 that is artificially high, which is why the jury
13 verdict, Your Honor -- to bring it back to the question
14 of the jury verdict -- is not a substitute for a RAND
15 rate, because, again, that rate is predicated on an
16 argument by Ericsson that it had no, no requirement to
17 deal with the chip makers.

18 THE COURT: Okay. Response?

19 MR. CAMPBELL: Your Honor, there was
20 extensive trial testimony from defendants about the
21 price of the chip and the value to the chip and how much
22 it should be based on third-party reports of the 2010
23 price of the chip.

24 The jury heard all this. The jury said
25 the RAND rate for the three patents at issue is 15 cents

1 a unit. It doesn't matter upstream -- we can quibble
2 over what the right terminology is, if it is exhaustion
3 in one direction and have-made rights in the other
4 direction.

5 But as Your Honor points out, if Dell and
6 Acer and Gateway and NETGEAR, if they have a license at
7 15 cents a unit for that chip on those three patents,
8 Intel has no exposure to those three patents anymore for
9 chips they sell to those customers. And that is what
10 their intervention was limited to was for those
11 customers. So that is done. It is set. The jury has
12 set the RAND rate at 15 cents.

13 To go back to the point that was being
14 made before, Mr. Bone said in the transcript on June 6th
15 at Page 19, Line 15 to Page 20, Line 5 that the value of
16 the patents-in-suit was 50 percent of the portfolio. So
17 there is 50 percent more there.

18 If the defendants truly believe that all
19 of the value in the portfolio is in these three patents,
20 well, Ericsson's in-house Counsel is here and has said
21 they can take a license to these three patents at 15
22 cents, that is what the case ought to be limited to,
23 that is what the jury said a RAND rate is, and we can be
24 done. And if there is no more value in the rest of the
25 portfolio, then that will bear itself over time --

81

1 THE COURT: What you are saying, from the
2 plaintiff's standpoint you feel that the Court should
3 set a RAND amount for these three patents?

4 MR. CAMPBELL: For these three patents.
5 And the defendants asked for a jury instruction to
6 consider the RAND obligations. The jury did that. It
7 is 15 cents for these three patents. If the Court wants
8 to go beyond that, 15 cents is where we start.

9 We know we have a portfolio that has more
10 value in it based on the existing licenses that are in
11 evidence, based on Mr. Bone's testimony that there is
12 another 50 percent of the value out there, based on Dr.
13 Perryman's testimony of there is more value -- there is
14 10 dollars more value of an "n" chip over a "g" chip and
15 that he thinks that Ericsson only has three percent of
16 the "n" patents, you get to 30 cents. There is a lot of
17 ways, a number of ways we get to 30, 35, 40 cents as a
18 reasonable royalty for the portfolio.

19 And I don't think the Court has to set a
20 rate. The Court needs to say whether Ericsson's offers
21 have been reasonable. And 35 cents is clearly
22 reasonable, especially when you consider the jury
23 verdict. 1.7 cents is nowhere in the bounds. And there
24 is no give and take here.

25 So 35 cents is the only reasonable offer

1 that has been made, the only reasonable offer by either
2 party.

3 THE COURT: So plaintiff is not
4 necessarily wanting the Court to go beyond the three
5 patents and the jury determination; but if the Court
6 does go beyond that, you are saying it ought to be 35
7 cents?

8 MR. CAMPBELL: It should be 35 cents --

9 THE COURT: As to the worldwide --

10 MR. CAMPBELL: As to the worldwide
11 portfolio. And keep in mind that, as was pointed out to
12 me, the worldwide portfolio offer is for the U.S.
13 patents beyond the three. It is for beyond U.S.
14 patents. It is also when Ericsson makes an offer for
15 its standard essential patents, it is for any patents
16 that might issue during the term of the license.

17 So we are not even limited to the patents
18 that are out there today. If patents issued during the
19 term of the license that are standard essential patents,
20 that license comes with that.

21 So that 35-cent offer, considering all of
22 the evidence and all of the patents that you are getting
23 rights to, is more than reasonable, especially
24 considering the jury's verdict.

25 And if I understand defendants correctly,

1 you are wanting the Court to go beyond these three
2 patents and determine a RAND license on a worldwide
3 basis?

4 MR. ALPER: We are asking for the Court
5 to go beyond these three patents and determine a
6 portfolio-wide, worldwide license. And we are asking
7 the Court to do its own RAND analysis because the RAND
8 evidence was not presented to the jury; and what
9 Ericsson has done by proposing a 35-cent rate -- or even
10 if we back it up and start with a 15-cent rate --

11 THE COURT: Excuse me. So if you want
12 the Court to go beyond, are you wanting the opportunity
13 to present more evidence on RAND for the worldwide
14 license and the other three patents?

15 MR. ALPER: We already did that, Your
16 Honor, in the context of the bench trial --

17 THE COURT: I'm sorry, what?

18 MR. ALPER: I'm sorry. We already did
19 that in the context of the bench trial through two
20 experts and a few fact witnesses. We have identified
21 that in our findings of fact and conclusions of law.

22 THE COURT: You are saying the record is
23 closed as to that?

24 MR. ALPER: The record is closed as to
25 that with the exception of some of the excerpts --

1 THE COURT: You are saying the Court has
2 everything it needs to make that RAND decision beyond
3 these three patents and beyond the U.S.?

4 MR. ALPER: That's absolutely right, Your
5 Honor. It is there. And if you would like, in a very
6 brief amount of time what I was prepared to do was
7 provide the framework that we are asking Your Honor to
8 adopt in looking at that evidence. And I can kind of
9 mostly just give you a perspective of how it is
10 organized.

11 THE COURT: Let me come back to that. I
12 am just trying to figure out where you are and where
13 they are.

14 Now, they have filed this motion to
15 supplement the record with this most recent letter. You
16 oppose that; but you say that if the Court allows that,
17 you would like to supplement the record with these
18 quotes from -- that you had up here on the screen a
19 moment ago?

20 MR. ALPER: Yes, and there might be --
21 this is a few excerpts. There might be some more
22 material from the --

23 THE COURT: But, see, this is what we get
24 into here. We had a trial. We closed it off. Now they
25 have a letter they want in. Now you say I have got

1 these things on the screen. But then you say there may
2 be more stuff. Well, I am sure they will come back and
3 say, well, there may be more stuff.

4 MR. ALPER: Right.

5 THE COURT: So do y'all want to have a
6 trial on this issue and bring witnesses and testify
7 about it again?

8 MR. ALPER: Well, this is a relatively
9 new development for us. I think that if we have a
10 paragraph or two from Mr. Bone's report that covers --
11 it may all be in this paragraph --

12 THE COURT: So your answer to my question
13 is, no, you don't want to have a further trial --

14 MR. ALPER: No, we do not need a further
15 trial.

16 THE COURT: -- and opportunity to present
17 further evidence?

18 MR. ALPER: That's correct, Your Honor,
19 we do not need a further trial.

20 THE COURT: And the Plaintiff doesn't
21 want to have a future trial, an opportunity to present
22 more evidence?

23 MR. CAMPBELL: We don't believe it is
24 necessary. The one piece of evidence we were asking to
25 put in happened after the trial. It was considered in

1 light of the trial.

2 THE COURT: I will grant your motion to
3 supplement the record with the letter that you are
4 requesting to supplement.

5 And I will grant your motion to
6 supplement it with what you had on the screen or one or
7 two paragraphs.

8 But if it goes beyond that, you can
9 object to it.

10 MR. CAMPBELL: Your Honor, if I could,
11 they are cherry-picking the paragraphs to avoid Mr.
12 Bone's explanation that it is 50 percent of the value.
13 If they are going to put in some paragraphs, we would
14 really like -- I would rather have the whole report in,
15 but at least the opportunity to cherry-pick a few
16 paragraphs to show the context of the paragraphs they
17 are picking out to show what his opinion was.

18 THE COURT: Okay. Do you have any
19 objection to that, Counsel?

20 MR. ALPER: No objection, Your Honor.

21 THE COURT: All right. You may -- after
22 you see what they put in, then you can file a brief
23 response with limited quotes to supplement the record.

24 MR. CAMPBELL: I understand.

25 THE COURT: All right. Anything further?

1 MR. ALPER: And as he says, Your Honor,
2 we will meet and confer over all of this and resolve
3 objections --

4 THE COURT: All right. Let's have all of
5 those in to me -- let's see. What is today? Tuesday.
6 In to me no later than noon on Thursday.

7 MR. ALPER: Yes, Your Honor.

8 THE COURT: We will be adjourned. Thank
9 you.

10 MR. VAN NEST: Your Honor, are we
11 adjourned for the morning?

12 THE COURT: Yes, for the day. Forever.

13 MR. ALPER: Your Honor, if I may --

14 MR. VAN NEST: Can I be heard on just two
15 points briefly?

16 THE COURT: No, but I would like to hear
17 from Mr. Arovas with regard to orthogonal codes and
18 overlay codes. Oh, that was last week.

19 [Laughter.]

20 MR. AROVAS: I have nothing more to say
21 in my life about --

22 THE COURT: Yes, you may --

23 Be seated, please.

24 Go ahead, Mr. Van Nest.

25 MR. ALPER: Your Honor, may I add one

1 thing to the RAND discussion before we close out on
2 that?

3 THE COURT: One thing.

4 MR. ALPER: Okay. Yes. The point that I
5 wanted to make is -- and we make this in our findings in
6 the brief, is that the 15-cent rate is not based on
7 RAND. The jury wasn't presented with significant RAND
8 evidence, for instance, the non-infringing alternatives.
9 The proportionality evidence wasn't presented to the
10 jury and certainly not on a worldwide level.

11 The 15 cents is a U.S. rate for the three
12 patents-in-suit. You can't extrapolate that from
13 that -- a RAND rate using the RAND analysis and
14 certainly not a worldwide rate. So that is just not a
15 good starting point.

16 THE COURT: You can't even say that is a
17 floor?

18 MR. ALPER: I'm sorry?

19 THE COURT: You couldn't say that is a
20 floor?

21 MR. ALPER: You can't say that is a floor
22 because of this reason: The RAND analysis requires us
23 to determine whether there is holdup value in the rate,
24 and you have to employ techniques like proportionality
25 looking at how many --

1 THE COURT: How do you expect the Court
2 to do this then?

3 MR. ALPER: We presented two experts who
4 provided that analysis, and we lay it out in our papers.
5 And they went through and they looked at how many --
6 actually several experts -- how many patents there
7 were.

8 THE COURT: Okay. Then that will be
9 before the Court.

10 MR. ALPER: Yes, Your Honor.

11 THE COURT: All right. Anything further?

12 MR. ALPER: I believe that -- thank you
13 very much.

14 MR. CAMPBELL: Your Honor, can I respond
15 to that for 10 seconds?

16 THE COURT: Yes, you may.

17 MR. CAMPBELL: I would just like to point
18 out, Defendants asked for an instruction for the jury to
19 consider the RAND obligations. The Court gave that
20 instruction.

21 If there is any evidence that was not
22 before the jury for them to make that determination,
23 that's defendants' fault. Not the jury's fault.

24 THE COURT: Thank you.

25 All right. Mr. Van Nest.

1 MR. VAN NEST: Just two points of
2 procedure, Your Honor.

3 With respect to the answer to the
4 question you asked Mr. Dauchot in providing an answer by
5 noon tomorrow, at least one and possibly two of my
6 clients are overseas in Taiwan. I am wondering since
7 you just set Thursday noon as the deadline for this
8 additional supplemental material, could we have until
9 Thursday noon to answer that question? I am worried
10 about being able to get in touch with clients in Taiwan.

11 THE COURT: Why don't we say Wednesday
12 noon. How is that for a compromise?

13 MR. VAN NEST: Wednesday noon is
14 tomorrow.

15 THE COURT: That's tomorrow.

16 MR. VAN NEST: That's what you said.

17 THE COURT: That's tomorrow. Today is
18 Tuesday. All right. Thursday at noon.

19 MR. VAN NEST: Thank you very much.
20 That's great.

21 One other point just on procedure, and I
22 think this is in agreement, I think it is understood
23 with respect to the JMOLs -- but I want to be sure if it
24 is not -- with respect to our JMOL motion on
25 non-infringement and validity, I think we are all in

1 agreement that the way that the jury verdict came out at
2 15 cents, essentially they awarded five cents per
3 patent.

4 If Your Honor were to determine that one
5 or two of the patents was not supported in the evidence
6 and granted a judgment as a matter of law, the
7 defendants would be fine with Your Honor simply reducing
8 the compulsory license by that comparable amount.

9 If you said, for example, that the '568
10 and '215 weren't supported and granted JMOL on those, it
11 is not our position that your only option is a new
12 trial. We would say we have already agreed --

13 THE COURT: You would agree to a pro
14 rata --

15 MR. VAN NEST: Yes, without a new trial.

16 THE COURT: What about plaintiffs?

17 MR. CAMPBELL: Your Honor, we have no
18 objections to that.

19 THE COURT: Okay.

20 MR. VAN NEST: I just wanted to be sure
21 Your Honor understood that was an option from our
22 standpoint since we have said we don't object --

23 THE COURT: I don't think anybody wants a
24 new trial.

25 MR. VAN NEST: I think that's right, Your

1 Honor.

2 THE COURT: Although I think you asked
3 for one, didn't you?

4 MR. VAN NEST: I did. Yeah.

5 THE COURT: But you don't really want
6 one, right?

7 [Laughter.]

8 MR. VAN NEST: I think you know what I
9 really want.

10 (Hearing adjourned.)

11

12 CERTIFICATION

13

14 I HEREBY CERTIFY that the foregoing is a
15 true and correct transcript from the stenographic notes
16 of the proceedings in the above-entitled matter to the
17 best of my ability.

18

19 /s/ Shea Sloan
20 SHEA SLOAN, CSR, RPR
21 Official Court Reporter
State of Texas No.: 3081
Expiration Date: 12/31/14

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